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# THE PITFALLS OF DIVERSION — CRITICISM OF A MODERN DEVELOPMENT IN AN ERA OF PENAL REFORM

By DARRYL T. DAVIES\*

At the present time, there is a general trend in criminological thinking toward less formalistic and non-adversarial procedures for handling persons who have violated the criminal law.<sup>1</sup> The rationale behind this thinking has been largely three-fold. First, there has been a recognition that over-reliance on the criminal courts when dealing with offenders has also meant an over-reliance on imprisonment in responding to them. Secondly, the prison population has increased dramatically and, as a result, there are serious difficulties in controlling and managing the large numbers of people in overcrowded institutions.<sup>2</sup> Finally, the reconviction rates of offenders have unequivocally demonstrated that imprisonment is not reducing recidivism, and may even be contributing to it. The rash of prison disturbances, hunger strikes, hostage-taking incidents, sit-ins, suicides, and physical violence within the penitentiaries in recent years, has illustrated that imprisonment is an ineffective and anachronistic method of coping with offenders and preventing crime in society.<sup>3</sup>

Whether this movement in developing new remedial methods is due to the pressures of institutional expediency, or whether it reflects a profound philosophical shift in coping with criminal behaviour is difficult to ascertain. In any event, new programmes are advocated and large-scale reforms are catalogued under the broad label of *diversion*.<sup>4</sup> Diversionary programmes are implemented in a number of provinces and indications are that others will be

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<sup>1</sup> See, Raymond T. Nimmer, "Diversion: The Search for Alternative Forms of Prosecution" (1974), Chicago, Illinois: American Bar Foundation 43. See, also, Dennis Briggs, *In Place of Prison* (Temple Smith, New Society, 1975). This point is also made in *The Principles of Sentencing and Dispositions*, Working Paper No. 3 of the Law Reform Commission of Canada (Ottawa: Information Canada, 1975) at 7-14.

<sup>2</sup> Nimmer, *supra*, note 1 at 43-45.

<sup>3</sup> See, Vorenberg and Vorenberg, "Early Diversion from the Criminal Justice System: Practice in Search of a Theory", in Lloyd E. Ohlin, ed., *Prisoners in America* (Englewood Cliffs, N.J.: Prentice-Hall, 1973) at 154. For further discussion on this subject, consult *Imprisonment and Release*, Working Paper No. 11 of the Law Reform Commission of Canada (Ottawa: Information Canada, 1975); K. Hawkins, "Alternatives to Imprisonment", at 67-71 in Sean McConville's (ed.) *The Use of Imprisonment: Essays in the Changing State of English Penal Policy* (Boston: Routledge & Kegan Paul, 1975).

<sup>4</sup> See, *Diversion*, Working Paper No. 7 of the Law Reform Commission of Canada, (Ottawa: Information Canada, 1975).

following their example.<sup>5</sup> The general disagreement over what diversion is and what it is not has resulted in considerable confusion. The Oxford English Dictionary defines diversion as follows: "(1) the turning aside (of anything) from its due or ordinary course or direction; a turning aside of one's course; deviation, deflection. (2) the turning aside (of any person or thing) from a settled or particular course of action, an object, or the like." As a result of the varying definitions that have been proposed, the concept of diversion is held by some to encompass a wide range of alternatives, and yet is narrowly confined to specific decision-making areas within the criminal justice system by others.<sup>6</sup>

The difficulties that have been encountered in defining diversion have made a consensus on its objectives extremely problematic. We do not know which offenders will be affected by diversion (*i.e.*, first offenders, recidivists), who will be responsible for the administration of diversionary programmes, or whether it will occur at a pre-trial level or at the post-adjudication level. It is difficult to ascertain which aims of the penal system are addressed by diversion and what societal concerns have been excluded in its formulation. Furthermore, the advocates of diversion programmes do not state whether such programmes serve a rehabilitative or retributive function, or both.

For the purposes of discussion in this paper, diversion is defined as any non-judicial procedure that aims at reducing the role of the criminal court by diverting cases away from its purview, and that places emphasis on restitution to the victim and the use of more informal and non-adversarial methods of handling criminal offenders. A move toward less adversarial procedures in dealing with offenders is not devoid of difficulties; this paper outlines the pitfalls and weaknesses of diversionary programmes as they pertain to the accused, the victim, and society.

## A. LIMITING PROCEDURAL LAW

In advocating diversion, proponents' thinking has been influenced in part by an optimistic belief that a less encumbered and non-adjudicative method of handling offenders may prove to be more successful than criminal court sanctions have been in the past.

It should be noted, however, that as we move toward a system of justice that places less and less reliance on procedural law, we may be ultimately creating a system that is even less equitable and imposes even greater

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<sup>5</sup> The Province of British Columbia is using community service orders and is working toward developing alternative programmes in the treatment of offenders. The Province of Saskatchewan is operating a fine options programme while Alberta has set up a programme of restitution for the victim in the City of Calgary. Other provinces are operating with a similar objective.

<sup>6</sup> Nimmer, *supra*, note 1, at 4: "... when such diversion is possible under the label, the label is useless. To assert that diversion is successful (or unsuccessful) is meaningless when one speaks of such diverse practices; there must be more precise specification of the activity. The ambiguity results from a failure to specify from what and to what the defendant is diverted." A similar criticism is voiced by Nora Klappmuts, "Diversion from the Justice System" in *Crime and Delinquency Literature*, March, 1974 at 109.

hardship on the accused than might be imposed had his case been subject to the procedural and evidentiary requirements inherent in a judicial hearing. First, we will be supplanting the present judicial structure, and its rigid evidentiary rules and requirements, with a new system that has not experienced the unique tradition and evolutionary development of its predecessor, the criminal court. Secondly, the modern invention of diversion is being called upon to perform a task that the judicial system has been able to accomplish only through historical experience and legal precedent. Diversionary alternatives are in an experimental phase, and it is unwise to jettison present-day court procedures for a system that may prove to be even more costly and less effective. Finally, the social and economic costs avoided by a non-adversarial proceeding may be incurred by the more extensive surveillance of offenders that will be required in the community by the criminal justice system. The procedural protections afforded persons under the due process of law will be usurped by unfettered administrative discretion, stripping the offender of the only real protection he would have against official abuse of authority. The rehabilitative ideal is still an ideal, and, as Francis A. Allen has indicated, such a social welfare approach in the criminal law may not be fair and in the best interests of the person to whom it is ultimately applied.<sup>7</sup>

## B. VENGEANCE

Vengeance is deeply entrenched in the public's conception of the administration of the criminal law. It follows that any attempt to utilize community-based dispositions, or diversionary practices that largely exclude the revenge aspect of the criminal law, may not be accepted by society as the most effective route for dealing with offenders. It has been recognized that punishment plays both a retaliatory and denunciatory function in the administration of the criminal law: reassuring society that no person who breaks the law will ultimately escape punishment for such acts, and showing society's disapproval of the crime.<sup>8</sup>

However, a more important question must be addressed. To what extent does a punishment-oriented model of criminal justice create a situation where attempts at reconciliation and resolution of the problem will be subordinated to obtaining vengeance and judicial retribution? As the objectives of the criminal law are predicated in part on judicial vengeance, it is conceivable that the general public will regard vengeance as an appropriate and legitimate method of protecting its interests. For example, a demand for vengeance

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<sup>7</sup> Francis A. Allen, *The Borderland of Criminal Justice: Essays in Law and Criminology* (Chicago: The University of Chicago Press, 1964) particularly at 16-24 and 25-28. For a more elaborate analysis of the treatment ideology, see, Johannes Andenaes, *Criminology General Prevention Revisited: Research and Policy Implications* (1975), 66 *The Journal of Criminal Law and Criminology*, especially at 339. Norval Morris makes this point as well in *The Future of Imprisonment*, (Chicago: University of Chicago Press, 1974) at 18.

<sup>8</sup> See, Nigel Walker, *Sentencing in a Rational Society* (London: Penguin Books Ltd., 1972) at 36. This point is also made in *Imprisonment and Release*, Working Paper No. 11 of the Law Reform Commission of Canada (Ottawa: Information Canada, 1975) at 19-23.

becomes apparent when we deal with the subject of accountability within the criminal justice system. A person victimized by official abuse, or a person subjected to harassment by a particular agency within the criminal justice system (*i.e.*, the police, prison guards) will more often believe that redress can only be achieved when vengeance is achieved. This means that attempts at an informal resolution of the conflict, as in a mediatory proceeding, may not be regarded as the most viable and effective method of dealing with an offender if society perceives it to be a non-punitive response.

When the criminal justice system emphasizes the denunciatory nature we can also assume that the public accepts vengeance as a legitimate and acceptable option to be followed whenever victimized. Therefore, informal resolutions would seldom be regarded with the same degree of satisfaction as the outcome of a case where the plaintiff successfully gains "his pound of flesh" from the defendant. A judicial system operating with the philosophy of not only penalizing the accused, but also promoting retaliation in the courts against him, could inculcate such a philosophy in the minds of the public, thus diminishing the prospects of attempting to reach an informal settlement through non-adversarial procedures.

### C. FAILURE OF THE COURTS

Proponents of diversion have, to a large extent, erroneously attributed defects in the administration of criminal justice to the criminal courts. The function of the court is to render a verdict based on law and probative evidence. There is an erroneous belief that the courts are responsible both for the high recidivism rates and the failure of penal sanctions to deter criminal offenders. If alternatives to imprisonment are lacking, the fault lies not with the judiciary, but with the legislature.

If available sanctions are either too severe or inadequate, it makes more sense to provide the courts with legislatively-created alternatives in order to improve the flexibility of the sentencing process. An increase in criminality cannot be attributed solely to the judiciary. The criminal court is no more responsible for unofficial retaliation by prison staff against the offender, by reason of having convicted him of a criminal offence, than the apathetic public is for not reporting crime, or the inadequately trained police are in not detecting it. To suggest that by attaching the umbilical cord of diversion to the criminal justice system, we will prevent crime and control criminal responsibility more effectively than the legal system, is purely speculative and without empirical justification.

### D. THE BARTHOLOMEW EFFECT OF REFORM

Diversion is part of what I call the "Bartholomew Effect in Penology"; that is, in our eagerness to devise alternatives to imprisonment, we may merely replace one method with another; creating more problems in the process. Throughout the evolution of the penal system, there has been a tendency to move precipitously in attempts to find cheap and effective solutions to the crime problem, rather than to exercise caution in considering the

potential abuses that might accompany those 'solutions'. As Laud Humphreys wrote, after reading David Rothman's *The Discovery of the Asylum*:

The social planner should study this book as penance, realizing the evil he can do by applying social theory to solving human problems. That goes for social scientists, legislators, journalists, and all sorts of moral entrepreneurs. Those in the legal profession should read it because when not numbered among the reformers, they may provide our only protection against those who strive to rehabilitate us.<sup>9</sup>

Before venturing into the untrammelled area of diversion, would-be reformers of the criminal justice system should consider the costs that might be incurred in the process. Failure to do so may create, in turn, an unforeseen menace that may be as equally disastrous as the one created years ago with the invention of the penitentiary. The historical roots of American penology vividly illustrate the traces of benevolence and philanthropy that led to the development of the penitentiary.<sup>10</sup> The concomitant tremors of that 'architectural fault' continue to rumble up to the present day, and some modern penologists predict that the 'earthquake' in the penitentiary system is not far off. The progeny of that unusual wedlock in penology, between rehabilitation of the offender and incarceration in the penitentiary, has undoubtedly proven to be our central nemesis in the administration of the criminal justice system.

#### E. DIVERSION – A MEANS OF DISPUTE-RESOLUTION

Certain after-care agencies, such as the John Howard Society of Saskatchewan, have argued that diversion should focus on a mediation procedure aimed at resolving conflict between the offender and the victim.<sup>11</sup> Under such a programme, the John Howard Society would act as mediator in specific cases referred by the police, the prosecutor, and in some instances, the courts.

There is a belief that resolving disputes in this manner will prove to be more effective than the present system, because it will place responsibility for the crime on the offender and force the offender to confront the victim. The consent of both the victim and the accused is required for mediation. The programme of mediation is flawed by serious shortcomings, such as the absence of the right to counsel, the right to a public hearing where guilt is judicially determined according to the rules of evidence and of law, the right to cross-examine witnesses, and the right of appeal. Furthermore, the proceedings of pre-trial diversion, such as those in a mediatory programme, are not bound by explicit written rules. This lack of standardization may result in inequities, since proceedings will neither be governed by judicial precedent, nor subject to public scrutiny. The low visibility of administrative decision-making may result in administrative disparities in the handling of offenders. Under this system, there is a strong possibility of discrimination against the poor. Not unlike the problems experienced when imposing fines, a mediation programme

<sup>9</sup> David J. Rothman, *Discovery of the Asylum* (Boston: Little Brown and Company, 1971). Also consult Richard V. Ericson, *Penal Psychiatry in Canada: The Method of Our Madness* (1976), 26 U. of T. L.J. 17.

<sup>10</sup> *Id.* at 84-85.

<sup>11</sup> John Howard Society of Saskatchewan, *Paper on Diversion* (Regina: June, 1975) especially at 10.

will enable middle-class offenders to purchase their freedom in an area of low visibility by merely making restitution to the victim.<sup>12</sup>

#### F. DIVERSION – PRESUMPTION OF GUILT

There is no guarantee that an accused who consents to diversion will be fully cognizant of his loss of rights. In such proceedings, the principle of our system of justice that guilt ought to be established in a court of law, is vital. An admission of responsibility does not, by itself, constitute a finding of guilt in a court of law. There is a strong possibility that a person, ignorant of his rights at law, may participate in a mediation proceeding and make restitution, when he would have been acquitted of the charge in a criminal court.

Our system of law is based on the philosophy that a person is presumed innocent until proven guilty; but under a system of diversion there is no comparable safeguard. The responsibility for determining guilt is a judicial function and not a policy or prosecutorial decision to be decided arbitrarily outside the court room. To allow such unstructured discretionary power to prevail is to seriously prejudice a criminal case; it excludes the significant role played by the defence lawyer and thereby permits the scales of justice to be heavily weighted against the accused. Since the proposed intermediary would have no legal training, the abrogation of basic legal rights in a diversion programme is a serious possibility.

#### G. VICTIM v. THE OFFENDER

Dispute-resolution programmes are often perceived to be effective because they bring the offender and victim together in a situation designed to reduce conflict between them. Unfortunately, there is no evidence at present to suggest that such a meeting will be in the best interests of either party. The accused may deceptively comply with the proceedings in order to avoid what he thinks will be a harsher disposition by the courts. There is little evidence to suggest that such a proceeding will serve the value of educating the offender and forcing him to accept responsibility for his act. A meeting could merely exacerbate the situation, inconvenience the victim, and possibly result in confrontation between the victim and the offender. Fear of retaliation might be perceived by the victim as an even greater threat in this type of non-adversarial proceeding than in a court of law. The victim may be reluctant to meet with the offender in what may prove to be a very intimidating and embarrassing experience. It is conceivable that persons may refrain from reporting crimes to the police if they know they may have to deal personally with the offender in order to gain redress.

#### H. DOUBLE JEOPARDY

The John Howard Society of Saskatchewan suggests that a diversionary scheme, such as mediation, will complement the present court structure. How-

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<sup>12</sup> This point is made in *Fines*, Working Paper No. 6 of the Law Reform Commission of Canada (Ottawa: Information Canada, 1974) at 32.

ever, if the offender or the victim elects to pursue the matter legally, rather than in a pre-trial diversion programme, or, if he has done so, and then defaults on the diversion order, there is a very strong likelihood that the judge will impose a harsher punishment on the offender.<sup>13</sup>

## I. EFFECTS ON DETERRENCE

There is a possibility that the deterrent of a criminal court sanction might be substantially reduced in a diversion programme.<sup>14</sup> For example, the adverse consequences of participating in a pre-trial mediation proceeding would not be as great as those where the stigma of a criminal record accompanied the conviction of the offender in a court of law. In this regard, diversionary programmes ignore the vital fact that one of the few deterrents to control middle-class persons from breaking the law is the public exposure to which they are subjected in the court room. The deterrent effect of the 'denunciatory ritual' in the court does have a significant impact on the middle and upper classes, and diversion would minimize, to a certain extent, and perhaps obviate its effect. The important deterrent effect of what Harold Garfinkel has called "status degradation" will be lost in the process.<sup>15</sup>

## J. DIVERSE AIMS OF THE PENAL SYSTEM

The agencies within the criminal justice system have different objectives; the use of an all-encompassing definition of diversion, such as that proposed by the Canada Law Reform Commission,<sup>16</sup> will require much greater co-ordination than presently exists within our justice system if it is to be effective. The likelihood of achieving uniformity in handling criminal offenders among the diverse agencies in our criminal justice system is doubtful. For example, the police do not view their function as being synonymous with that of a social worker. Law enforcement agencies are very reluctant to participate in programmes which they perceive to be too lenient, and policemen are particularly skeptical of after-care agencies, such as the John Howard Society, which advocate remedial programmes.

A danger also exists that the police will use their discretion of referral selectively and capriciously, and, consequently, decide that two offenders who have committed similar offences, who are of the same age, and who have similar backgrounds ought to be subject to different treatment. Police referrals to a diversion programme may be largely persons from the middle and upper classes, where there will be a greater likelihood of a lenient disposition.<sup>17</sup>

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<sup>13</sup> This point is taken into consideration by the Law Reform Commission of Canada in its Working Paper, *Diversion* (Ottawa: Information Canada, 1975) at 19-20.

<sup>14</sup> Hawkins, *supra*, note 3 at 79.

<sup>15</sup> Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, (1956) 61 *American Journal of Sociology* at 421-22.

<sup>16</sup> Note the definition of "diversion" by the Law Reform Commission of Canada in its Seventh Working Paper, *Diversion* (Ottawa: Information Canada, 1975).

<sup>17</sup> Police officers may feel a harsher disposition is warranted for the lower-class section of the population. A policeman's discretion in this regard will be unstructured and arbitrary, and the possibilities for abuse will be substantial.



Police offenders might believe that intractable and lower class persons will be dealt with more effectively by the courts, where the severity of a criminal sanction will be adequate to punish and deter them, than by a diversion programme.

#### K. EXPANDING THE NET OF SOCIAL CONTROL

Another criticism of diversion is the fact that some of its programmes (*i.e.*, dispute-resolution programmes) may apply to persons who would normally have been dealt with outside the adversarial process.<sup>18</sup> By referring persons to a diversionary programme, we could be extending the net of social control by exposing more persons, rather than fewer, to the criminal justice system. There is a possibility that a person who commits an offence, who would otherwise be warned by the police, might end up being referred to a specific non-adversarial agency for adjudication. If such a person breaches or defaults on a diversion order, it is possible that he may be diverted eventually into the criminal justice system, rather than away from it.

#### L. DIVERTING THE RECIDIVIST

Diversion programmes do not give an indication of how they will handle recidivists. A person who agrees to a resolution of a situation outside of the court may in fact persist in his criminal behaviour. As a result, the offender could be making restitution to one victim, while committing a crime against another. It is illogical to expect that once detected he should voluntarily meet with all his victims, and then make restitution on a level that could be well beyond his financial means.

Proponents of diversion do not define what constitutes a first offender in their programme. The standard practice of taking offences into consideration has been condoned by the courts and often regarded as a mitigating factor when sentencing the offender. Under a diversionary scheme which emphasized mediation, it is unlikely that an offender will be prepared to admit to the frequency of his previous criminal activity, especially if he knows he may be required to confront and make restitution to more than one victim.

#### M. SUMMARY

In light of the previous discussion, it is apparent that diversionary programmes present major problems that must be solved before we can consider them to be viable and pragmatic alternatives to the existing criminal justice system. When we seek non-adversarial alternatives, we should consider the fact that we still have not adequately assessed the effectiveness of present measures, such as fines, probation, and discharges.<sup>19</sup> There is no empirical

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<sup>18</sup> *Diversion*, Working Paper No. 7 of the Law Reform Commission of Canada (Ottawa: Information Canada, 1975) at 15.

<sup>19</sup> Although empirical research has been carried out, there is still considerable uncertainty about the efficiency of using specific types of penal measures for offenders. See R. Hood and R. Sparks, *Key Issues in Criminology* (New York: McGraw Hill, 1970). Although the fine options programme is being used in Saskatchewan, it is still too premature to draw conclusions about the effectiveness of the programme.

evidence available to indicate that diversion will be more effective in reducing the prison population, lowering recidivism rates, deterring offenders, and protecting society more effectively. As a result, it is premature to advocate a movement away from the present court structure and sanctions system.

Before we adopt unorthodox measures on an extensive basis, we should try diversionary programmes on a piecemeal basis until such time as they prove to be more effective than present criminal sanctions in dealing with offenders. Diversionary programmes would have to be subject to continuous experimentation and evaluation; initially they should apply only to those criminal cases where a judicial determination of guilt has already been made and the likelihood of a short-term prison sentence for the offender appears inevitable.

The creation of a diversion bureaucracy outside the court room is unnecessary if we can incorporate diversionary alternatives into the sentencing process. If present criminal sanctions are too rigid, it makes more sense to strengthen and expand non-custodial methods within the confines of the legal system, where they can be administered by the courts. Legislation at the provincial or federal level to enact a *Diversion Act* would be extremely useful, and ought to be a *sine qua non* before any form of diversionary programme is implemented. Under a federal or provincial statute, specific rules and procedures would then govern the disposition of cases according to the law. The decision to refer a person to a diversionary programme would be governed by the courts, thus giving the judiciary greater latitude in using non-custodial methods when sentencing criminal offenders.

Before moving too rapidly in adopting new techniques, we ought to consider the social and economic costs to the offender, the victim, and society. Deterrence has proven to be effective only where the negative consequence of detection are familiar to the offender.<sup>20</sup> The risk we run by generating a proliferation of new methods for handling offenders is the concomitant widespread confusion which might result for both potential criminal offenders who weigh the costs involved in committing a crime, and the courts which must select the appropriate sanction for a particular offender.<sup>21</sup> Increasing the use of non-custodial methods and the injection of new diversionary alternatives into the sentencing stage will require an expansion of present court facilities and personnel if they are to be properly administered.

If our objective is to improve our system of dispensing justice, then we can operate safely within the present system by reforming our laws and amending the *Criminal Code* to ensure the law is in tune with present societal values. To move too quickly in one direction or the other is dangerous; we may unknowingly sacrifice extremely important legal values and procedural protections in our eagerness to reform the criminal justice system.

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<sup>20</sup> E. A. Fattah, "Deterrence: A Review of the Literature", in *Fear of Punishment: Deterrence*, the Law Reform Commission of Canada (Ottawa: Minister of Supplies and Services, 1976) particularly at 27-29.

<sup>21</sup> *Supra*, note 3 at 78.

